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Liew Ket Boh & Anor v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–185–05 OF 2021
NOR BEE ARIFFIN, RAVINTHRAN AND GHAZALI CHA JJCA
24 JANUARY 2024

C *Criminal Procedure — Forfeiture — Monies in bank accounts — High Court allowed public prosecutor's application under s 56(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities ('the AMLATFPUAA' — Investment scheme — Proceeds of unlawful activity — Predicate offence of cheating — Whether public prosecutor failed to identify* D *which transactions were in respect of proceeds of predicate offence — Whether all 'exact transactions' on bank accounts must be linked to unlawful activity — Whether court could rely on statements made under s 32 of AMLATFPUAA and s 112 of the Criminal Procedure Code as proof that appellants committed or abetted or participated in the commission of predicate offence — Anti-Money* E *Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3(1), 4(1), 32, 56(1), 70 & 71 — Criminal Procedure Code s 112 & 113 — Penal Code s 420*

F This was an appeal against the decision of the High Court in allowing the application of the public prosecutor pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA') to forfeit monies in bank accounts belonging to Liew Ket Boh, Kenny Liew Ket Weng ('Kenny Liew') and two others, namely Centrowest Trading and Sun Construction. Liew Ket Boh and Kenny G Liew opposed the application. The case started with police reports lodged by Ferdinand Fascol and 29 other complainants alleging that they were cheated in an investment scheme initiated by an entity known as Grow Asia Capital Ventures ('Grow Asia'). The police officer tasked with investigating the said police reports was Sarjan Zairey Lee. He was the predicate offence investigating H officer and he had investigated the case under s 420 of the Penal Code ('the PC'). The relevant facts of the case could be gleaned from the decision of the High Court. The learned High Court judge found that the investors made numerous deposits into the bank accounts of two entities known as Grow Asia and Carousell Capital. Grow Asia was registered under the name of Wilton I Sikin ('Wilton'). Subsequently, the monies were transferred to the bank accounts of Centrowest and Sun Construction that held trading licenses registered under the name of Jazrul. Jazrul said that the two accounts were actually controlled by Liew Ket Boh under whose instruction he acted. The learned High Court judge also noted that Kenny Liew admitted collecting a

sum of RM400,000 from Jazrul to be deposited into Liew Ket Boh's bank account. The learned High Court judge was satisfied that Sarjan Zairey Lee, the predicate offence investigating officer and ASP Hazwani, the AMLATFPUAA investigating officer had carried out a careful investigation. Further, in relation to the objection pursuant to s 113 of the Criminal Procedure Code ('the CPC') against the statements recorded under s 112 of the CPC ('the s 112 CPC statements'), inter alia, the statements by Jazrul, Wilton and Mariana, the learned High Court judge noted that the prosecution had also adduced a statement given by Sarjan Zairey Lee under s 32 of the AMLATFPUAA in which the contents of the s 112 CPC statements of the witnesses were repeated. In addition, Sarjan Zairey Lee had also affirmed an affidavit in which he repeated the evidence he gathered in the s 112 CPC statements. Further, the learned judge ruled that the prosecution was not required to prove that the appellants committed the predicate offence under s 420 of the PC but only needed to prove on a balance of probabilities that the assets sought to be forfeited were derived from unlawful activity. Considering that there was a link between the monies that were seized in the accounts of Liew Ket Boh and Kenny Liew ('the appellants') and the investment scheme and their explanation in respect of the source of the monies was not satisfactory, the learned High Court judge found that the prosecution had proved on a balance of probabilities that the said monies were proceeds of unlawful activity. Consequently, the application by the public prosecutor was allowed and all the monies in the seized bank accounts were forfeited, hence, the present appeals. The appellants submitted that: (a) the public prosecutor failed to identify which transactions were in respect of the proceeds of the predicate offence ('the first issue'); and (b) the public prosecutor had failed to prove that the appellants committed or abetted or participated in the commission of the predicate offence for two reasons: firstly, that the court could not rely on s 32 of the AMLATFPUAA statement of Sarjan Zairey Lee, and secondly, the High Court had allegedly relied on the s 112 CPC statements which were hearsay and inadmissible evidence ('the second issue').

Held, dismissing the appeals:

(1) In a forfeiture application under s 56(1) of the AMLATFPUA, the central question was whether, on a balance of probabilities, the prosecution had proven that the balances in the bank accounts of the appellants were the proceeds of unlawful activity. The court found that the public prosecutor had tendered cogent evidence to prove this fact. However, it was not necessary to link the monies deposited into the bank accounts of Grow Asia and Carousel Capital by investors to every single transaction in the bank accounts of the appellants. In this respect, the case of *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823 ('*Billion Nova*'s case') cited by the counsel for the appellants was distinguishable in the facts (see paras 35–36).

(2) In *Billion Nova*'s case, the entire case for the existence of the predicate offence was based on the 82 cash deposits made from outside of Labuan into the accounts of the company. There was no other evidence of the predicate offence. However, in the present case, there was evidence that the predicate offence of cheating had been committed. 29 victims lodged police reports and gave s 112 CPC statements saying that they had been cheated in the Grow Asia investment scheme and that they had lost their investment. Whether they had been cheated or not was a question of fact. Under s 70 of the AMLATFPUAA, such a question of fact could be decided on a balance of probabilities. The High Court decided that they had been cheated. It was immaterial that the appellants or other individuals were not convicted of the offence of cheating as that was not a pre-condition under s 56(1) of the AMLATFPUAA (see paras 46–47).

(3) Similarly, there was no requirement to obtain a conviction for a money laundering offence under s 4(1) of the AMLATFPUAA against any individual before instituting forfeiture proceedings. Under the broad definition of money laundering, any engagement directly or indirectly with proceeds of unlawful activity would be sufficient. And for the purpose of forfeiture proceedings, the standard of proof was the civil standard namely, balance of probabilities. Thus, the flow of the victims' monies into any bank account was sufficient to prove the existence of the offence of money laundering on a balance of probabilities even though no individual was charged or convicted. This fact was clearly proven by the public prosecutor as found by the High Court. Therefore, the appellants' argument that all the 'exact transactions' on the bank accounts must be linked to the unlawful activity was not envisaged in the AMLATFPUAA (see paras 48–49).

(4) Since the seized properties in question were liquid assets, it became a formidable challenge for enforcement authorities to prove the direct correlation of every single cash deposit or transaction in a seized bank account with the unlawful activity. However, in the court's opinion, the broad definition of 'proceeds of unlawful activity' under s 3(1) of the AMLATFPUAA should come to the aid of the public prosecutor. Drawing an analogy, if the property in question was an immovable asset purchased using partly proceeds of unlawful activity and partly other legitimate funds, the entire property would be caught by the said broad definition. Any other interpretation would jeopardize the objective of the AMLATFPUAA, which was aimed at depriving serious crime offenders of their ill-gotten gains. For the above reasons, the court found no merit in the first issue raised by the appellants (see paras 50–54).

(5) The court found that the s 112 CPC statements of Jazrul, Wilton and Mariana could be used in the proceedings under s 56 of the AMLATFPUAA. A holistic reading of all the limbs of s 113 of the CPC

pointed to the conclusion that a s 112 CPC statement was barred from being used by the prosecution in a criminal trial only. However, a s 56(1) proceeding under the AMLATFPUAA was a quasi-criminal proceeding against proceeds derived from unlawful activity only. Further, s 71 of the AMLATFPUAA was drafted widely and contained the words 'notwithstanding anything to the contrary in any written law'. It allowed any 'document' or 'evidence' obtained by the public prosecutor or enforcement agency to be used in a s 56(1) proceeding. In the present case, the AMLATFPUAA investigating officer had accessed all the relevant documents and evidence including that obtained by the predicate offence investigating officer. The information collected by the predicate investigating officer through the s 112 CPC statements of Jazrul and Wilton were repeated in his s 32 AMLATFPUAA statement. In the premises, the information contained in the s 112 CPC statements recorded by the predicate offence investigating officer clearly fell within the ambit of s 71 of the AMLATFPUAA (see paras 60–61).

(6) Considering that the AMLATFPUAA was a special law governing matters connected with the offence of money laundering and forfeiture proceedings, the general provision of s 113 of the CPC should yield to s 71 of the AMLATFPUAA. In any event, s 71 was only concerned with admissibility of documents and evidence. As to the weight to be attached to such documents and evidence, it was entirely up to the first instance court to consider the credibility and reliability of them. Therefore, the court found no error on the part of the learned High Court judge when His Lordship considered the s 32 AMLATFPUAA statement and affidavit of the predicate offence investigating officer that repeated the contents of the impugned s 112 CPC statements. On totality, the court ruled that the information contained in the statement of the predicate offence investigating officer (Sarjan Zairey Lee) recorded under s 32(2) of the AMLATFPUAA by ASP Nor Hazwani that was considered by the High Court was not hearsay as argued by the counsel for the appellants (see paras 62 & 65).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan pendakwa raya menurut s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLATFPUAA') untuk melucuthakan wang dalam akaun bank milik Liew Ket Boh, Kenny Liew Ket Weng ('Kenny Liew') dan dua lagi, iaitu Centrowest Trading dan Sun Construction. Liew Ket Boh dan Kenny Liew menentang permohonan tersebut. Kes bermula dengan laporan-laporan polis yang dibuat oleh Ferdinand Fascol dan 29 pengadu lain yang mendakwa mereka ditipu dalam skim pelaburan yang dimulakan oleh entiti yang dikenali sebagai Grow Asia Capital Ventures ('Grow Asia'). Pegawai

polis yang ditugaskan untuk menyiasat laporan-laporan polis tersebut ialah Sarjan Zairey Lee. Dia adalah pegawai penyiasat kesalahan predikat dan dia telah menyiasat kes tersebut di bawah s 420 Kanun Keseksaan ('KK'). Fakta kes yang berkaitan boleh didapati daripada keputusan Mahkamah Tinggi. Hakim Mahkamah Tinggi yang arif mendapati bahawa pelabur-pelabur membuat deposit yang banyak ke dalam akaun bank dua entiti yang dikenali sebagai Grow Asia dan Carousell Capital. Grow Asia telah didaftarkan di bawah nama Wilton Sikin ('Wilton'). Selepas itu, wang tersebut dipindahkan ke akaun bank Centrowest dan Sun Construction yang memegang lesen dagangan yang didaftarkan di bawah nama Jazrul. Jazrul berkata, kedua-dua akaun tersebut sebenarnya dikawal oleh Liew Ket Boh yang telah mengarahkannya. Hakim Mahkamah Tinggi yang arif juga menyatakan bahawa Kenny Liew mengaku menerima sejumlah RM400,000 daripada Jazrul untuk dimasukkan ke dalam akaun bank Liew Ket Boh. Hakim Mahkamah Tinggi yang arif berpuas hati bahawa Sarjan Zairey Lee, pegawai penyiasat kesalahan predikat dan ASP Hazwani, pegawai penyiasat AMLATFPUAA telah menjalankan siasatan yang teliti. Selanjutnya, berhubung dengan bantahan menurut s 113 Kanun Tatacara Jenayah ('KTJ') terhadap pernyataan yang direkodkan di bawah s 112 KTJ ('pernyataan s 112 KTJ'), antara lain, pernyataan-pernyataan oleh Jazrul, Wilton dan Mariana, hakim Mahkamah Tinggi yang arif menyatakan bahawa pihak pendakwaan juga telah mengemukakan pernyataan yang diberikan oleh Sarjan Zairey Lee di bawah s 32 AMLATFPUAA di mana kandungan pernyataan s 112 KTJ saksi-saksi tersebut telah diulang. Di samping itu, Sarjan Zairey Lee juga telah mengesahkan afidavit di mana dia mengulangi keterangan yang dia kumpulkan dalam pernyataan s 112 KTJ tersebut. Selanjutnya, hakim yang arif memutuskan bahawa pihak pendakwaan tidak perlu membuktikan bahawa perayu-perayu melakukan kesalahan predikat di bawah s 420 KK tetapi hanya perlu membuktikan atas imbangan kebarangkalian bahawa aset yang ingin dilucuthakan diperoleh daripada aktiviti haram. Memandangkan terdapat kaitan antara wang yang telah disita dalam akaun Liew Ket Boh dan Kenny Liew ('perayu-perayu') dan skim pelaburan tersebut dan penjelasan mereka berkenaan dengan sumber wang tersebut adalah tidak memuaskan, hakim Mahkamah Tinggi yang bijaksana mendapati bahawa pihak pendakwaan telah membuktikan di atas imbangan kebarangkalian bahawa wang tersebut adalah hasil daripada aktiviti haram. Oleh itu, permohonan oleh pendakwa raya dibenarkan dan semua wang dalam akaun bank yang disita telah dilucuthakan, justeru, rayuan semasa. Perayu-perayu berhujah bahawa: (a) pendakwa raya gagal untuk mengenal pasti transaksi mana yang berkaitan dengan hasil kesalahan predikat ('isu pertama'); dan (b) pendakwa raya telah gagal membuktikan bahawa perayu-perayu melakukan atau bersubahat atau mengambil bahagian dalam pelakuan kesalahan predikat atas dua sebab: pertama, bahawa mahkamah tidak boleh bergantung pada pernyataan di bawah s 32 AMLATFPUAA oleh Sarjan Zairey Lee, dan kedua, Mahkamah Tinggi didakwa bergantung pada pernyataan s 112 KTJ tersebut yang merupakan keterangan dengar cakap dan

keterangan yang tidak boleh diterima ('isu kedua'). A

Diputuskan, menolak rayuan-rayuan:

(1) Dalam permohonan pelucuthakan di bawah s 56(1) AMLATFPUA, persoalan utama ialah sama ada, di atas imbangan kebarangkalian, pihak pendakwaan telah membuktikan bahawa baki dalam akaun bank perayu-perayu adalah hasil daripada aktiviti haram. Mahkamah mendapati bahawa pendakwa raya telah mengemukakan keterangan kukuh untuk membuktikan fakta ini. Walau bagaimanapun, wang yang didepositkan oleh pelabur-pelabur ke dalam akaun bank Grow Asia dan Carousel Capital tidak perlu dikaitkan dengan setiap transaksi dalam akaun bank perayu-perayu. Dalam hal ini, kes *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823 ('kes *Billion Nova*') yang dipetik oleh peguam untuk perayu-perayu boleh dibezakan dalam fakta (lihat perenggan 35–36). B C D

(2) Dalam kes *Billion Nova*, keseluruhan kes bagi kewujudan kesalahan predikat adalah berdasarkan 82 deposit tunai yang dibuat dari luar kawasan Labuan ke dalam akaun syarikat. Tiada keterangan lain mengenai kesalahan predikat. Walau bagaimanapun, dalam kes ini, terdapat keterangan bahawa kesalahan predikat penipuan telah dilakukan. 29 mangsa membuat laporan polis dan memberikan pernyataan s 112 KTJ mengatakan bahawa mereka telah ditipu dalam skim pelaburan Grow Asia dan bahawa mereka telah kehilangan pelaburan mereka. Sama ada mereka telah ditipu atau tidak adalah persoalan fakta. Di bawah s 70 AMLATFPUAA, persoalan fakta seperti itu boleh diputuskan di atas imbangan kebarangkalian. Mahkamah Tinggi memutuskan bahawa mereka telah ditipu. Adalah tidak penting bahawa perayu-perayu atau individu-individu lain tidak disabitkan dengan kesalahan menipu kerana itu bukan pra-syarat di bawah s 56(1) AMLATFPUAA (lihat perenggan 46–47). E F G

(3) Begitu juga, tiada keperluan untuk mendapatkan sabitan bagi kesalahan pengubahan wang haram di bawah s 4(1) AMLATFPUAA terhadap mana-mana individu sebelum memulakan prosiding pelucuthakan. Di bawah definisi luas pengubahan wang haram, apa-apa penglibatan secara langsung atau tidak langsung dengan hasil daripada aktiviti haram adalah mencukupi. Dan untuk tujuan prosiding pelucuthakan, standard pembuktian adalah standard sivil iaitu, imbangan kebarangkalian. Oleh itu, pengaliran wang mangsa-mangsa ke dalam mana-mana akaun bank adalah mencukupi untuk membuktikan wujudnya kesalahan pengubahan wang haram atas imbangan kebarangkalian walaupun tiada individu yang didakwa atau disabitkan kesalahan. Fakta ini jelas dibuktikan oleh pihak pendakwa raya seperti yang ditemui oleh Mahkamah Tinggi. Oleh itu, hujah perayu-perayu bahawa semua 'exact H I

transactions' pada akaun bank mesti dikaitkan dengan aktiviti yang menyalahi undang-undang tidak dinyatakan dalam AMLATFPUAA (lihat perenggan 48–49).

(4) Memandangkan harta yang disita adalah aset cair, ia menjadi cabaran yang menggerunkan bagi pihak penguatkuasa untuk membuktikan korelasi langsung setiap deposit tunai atau transaksi dalam akaun bank yang disita dengan aktiviti haram. Walau bagaimanapun, pada pendapat mahkamah, tafsiran luas 'hasil daripada aktiviti haram' di bawah s 3(1) AMLATFPUAA harus membantu pendakwa raya. Sebagai analogi, jika harta yang dipersoalkan adalah aset tak alih yang dibeli menggunakan sebahagian hasil daripada aktiviti haram dan sebahagian lagi daripada dana sah, keseluruhan harta tersebut akan termasuk dalam tafsiran luas tersebut. Apa-apa tafsiran lain akan menjejaskan objektif AMLATFPUAA, yang bertujuan untuk melucutkan keuntungan pesalah jenayah serius daripada keuntungan yang diperoleh secara haram. Atas alasan-alasan di atas, mahkamah mendapati tiada merit dalam isu pertama yang dibangkitkan oleh perayu-perayu (lihat perenggan 50–54).

(5) Mahkamah mendapati bahawa pernyataan-pernyataan s 112 KTJ oleh Jazrul, Wilton dan Mariana boleh digunakan dalam prosiding di bawah s 56 AMLATFPUAA. Pembacaan holistik semua limba s 113 KTJ menunjukkan kesimpulan bahawa pernyataan s 112 KTJ dilarang daripada digunakan oleh pihak pendakwaan dalam perbicaraan jenayah sahaja. Walau bagaimanapun, prosiding s 56(1) di bawah AMLATFPUAA adalah prosiding separa jenayah terhadap hasil yang diperoleh daripada aktiviti haram sahaja. Selanjutnya, s 71 AMLATFPUAA telah digubal secara meluas dan mengandungi perkataan 'walau apa pun apa-apa jua yang belawanan dalam mana-mana undang-undang bertulis'. Ia membenarkan apa-apa 'dokumen' atau 'keterangan' yang diperoleh oleh pendakwa raya atau agensi penguatkuasaan untuk digunakan dalam prosiding s 56(1). Dalam kes ini, pegawai penyiasat AMLATFPUAA telah mengakses semua dokumen dan keterangan yang berkaitan termasuk yang diperolehi oleh pegawai penyiasat kesalahan predikat. Maklumat yang dikumpul oleh pegawai penyiasat predikat melalui pernyataan-pernyataan s 112 KTJ oleh Jazrul dan Wilton telah diulang dalam pernyataan 32 AMLATFPUAA beliau. Di atas alasan-alasan tersebut, maklumat yang terkandung dalam pernyataan-pernyataan s 112 KTJ yang direkodkan oleh pegawai penyiasat kesalahan predikat jelas termasuk dalam lingkungan s 71 AMLATFPUAA (lihat perenggan 60–61).

(6) Memandangkan AMLATFPUAA adalah undang-undang khas yang mengawal perkara yang berkaitan dengan kesalahan pengubahan wang haram dan prosiding pelucuthakan, peruntukan am s 113 KTJ harus tunduk kepada s 71 AMLATFPUAA. Walau apa pun, s 71 hanya

berkenaan dengan kebolehterimaan dokumen dan keterangan. Mengenai pemberatan yang perlu diberikan pada dokumen dan keterangan tersebut, terpulang sepenuhnya kepada mahkamah perbicaraan untuk mempertimbangkan kredibiliti dan kebolehpercayaannya. Oleh itu, mahkamah mendapati tiada kekhilafan di pihak hakim Mahkamah Tinggi apabila Yang Arif mempertimbangkan pernyataan 32 AMLATFPUAA dan afidavit pegawai penyiasat kesalahan predikat yang mengulangi kandungan pernyataan-pernyataan s 112 KTJ yang dipertikaikan. Secara keseluruhannya, mahkamah memutuskan bahawa maklumat yang terkandung dalam pernyataan pegawai penyiasat kesalahan predikat (Sarjan Zairey Lee) yang direkodkan di bawah s 32(2) AMLATFPUAA oleh ASP Nor Hazwani yang dipertimbangkan oleh Mahkamah Tinggi bukanlah keterangan dengar cakap seperti yang dihujahkan oleh peguam perayu-perayu (lihat perenggan 62 & 65).]

Cases referred to

PP v Awalluddin bin Sham Bokhari [2018] 2 MLJ 401; [2018] 1 CLJ 305, FC (folld)

PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 4 MLRA 226, CA (distd)

PP v CPO Resources & Ors [2019] MLJU 756; [2019] 1 LNS 846, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Act 2001 ss 3(1), (1)(a), (1)(b), 4(1), (1)(a), 32, 32(2), 40, 50(1), 56, 56(1), (4), 61, 70, 71

Criminal Procedure Code ss 112, 113

Customs Act 1967 s 135(1)(g)

Penal Code s 420

Appeal from: Criminal Application No BKI-44–20/12 of 2019 (High Court, Kota Kinabalu)

Goldam bin Hamid (Liau Kee Siong & Co) for the appellants.

Zaki Asyraf bin Zubir (Deputy Public Prosecutor, Attorney General's Chamber) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court that allowed the application of the public prosecutor to forfeit monies in bank accounts

belonging to Liew Ket Boh, Kenny Liew Ket Weng ('Kenny Liew') and two others, namely Centrowest Trading and Sun Construction. The application was made under s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities ('the AMLATFPUAA'). Centrowest Trading and Sun Construction did not contest the application of the public prosecutor. Liew Ket Boh and Kenny Liew opposed the application. The High Court allowed the application of the public prosecutor. Now, Liew Ket Boh and Kenny Liew who were the third and fourth respondents in the High Court have appealed against the forfeiture order made against the monies in their seized bank accounts.

AFFIDAVIT EVIDENCE OF THE PUBLIC PROSECUTOR

[2] The brief background facts summarized from the grounds of decision of the learned High Court judge and the affidavits filed by the public prosecutor are as follows.

[3] One Ferdinand Fascol complained that he lost the money that he had invested in a scheme initiated by an entity known as Grow Asia Capital Ventures ('Grow Asia'). He was led to believe that Grow Asia was involved in the business of exporting durians to China. He deposited a sum of RM12,000 into a current account under the name of Carousell Capital. Initially, he received a 'return' on his 'investment' but subsequently the payments ceased and he was unable to recover his deposit. He lodged a police report stating that he was cheated.

[4] The police officer appointed to investigate the police report was Sarjan Zairey Lee. He is the predicate offence investigating officer. He investigated the case under s 420 of the Penal Code. The public prosecutor did not charge anyone with a criminal offence at the conclusion of the investigation. Forfeiture proceedings were instituted instead.

[5] Sarjan Zairey Lee filed a lengthy affidavit to support the forfeiture application. Sarjan Zairey Lee confirmed in his affidavit that Ferdinand Fascol deposited RM12,000 on 9 November 2018 into a numbered account with CIMB Bank Bhd under the name of Carousel Capital. Ferdinand was promised a daily return of RM720 for a period of 78 days for his investment of RM12,000. However, Ferdinand only received a total of RM3,600 for the period 12 November 2018 to 15 November 2018. He did not receive the promised returns or the balance of his deposit.

[6] Sarjan Zairey Lee also discovered that 29 other complainants had lodged similar police reports in respect of their supposed investments in Grow Asia. The said complainants' police reports are exhibited in the affidavit of

Sarjan Zairey Lee. The monies of these investors were deposited into the account of Carousel Capital and another account under the name of Grow Asia with CIMB Bank. Sarjan Zairey Lee discovered that the bank accounts of Carousel Capital and Grow Asia received deposits of various sums of money from 'investors' during the second half of 2018.

[7] Sarjan Zairey Lee also discovered that Grow Asia was issued with a business registration licence by the Dewan Bandaran Kota Kinabalu ('DBKK'). It was registered under the name of one Wilton Sikin ('Wilton'). The monies from these two accounts were subsequently transferred to the Ambank account of Centrowest Trading and the Hong Leong Bank account of Sun Construction. On the same day, ie 30 November 2018, the CIMB accounts of Carousel Capital and Grow Asia were closed.

[8] The Centrowest Trading and Sun Construction trading licenses issued by DBKK were registered in the name of Muhammad Jazrul bin Abdul Aziz ('Jazrul'). In his s 112 Criminal Procedure Code ('the CPC') statement, Wilton said that Jazrul wanted to use his name for the trading licence of Grow Asia and promised him a 'commission'. The apparent reason for using Wilton's name was to shield Jazrul's employer from being accountable for tax liabilities related to a road project awarded to his company. Wilton further claimed he was not aware of any of the transactions in the bank accounts in question as they were managed by Jazrul, who even retained control of the ATM cards. Armed with this information, Sarjan Zairey Lee proceeded to investigate Jazrul.

[9] In his s 112 CPC statement, Jazrul explained that towards the end of 2015, Liew Ket Boh offered him a job and tasked him with registering trading licences and opening bank accounts to avoid tax liability. Jazrul said he convinced two individuals, namely, Anirah and Wilton to allow him to use their names for the said trading licenses and bank accounts. Wilton's name was used for Grow Asia's account whereas Anirah's name was used for Carousel Capital's name. However, Sarjan Zairey Lee was unable to locate Anirah during the investigation.

[10] Jazrul said the registration of the trading licences was arranged by Mariana bt Amat Alan under the instructions of Liew Ket Boh. Jazrul admitted that the Ambank account of Centrowest Trading and the Hong Leong Bank account of Sun Construction were registered under his name. However, he said that all transactions on these accounts were controlled by Liew Ket Boh. Jazrul's involvement was limited to instances when he visited the bank for cash withdrawals. On these occasions, the withdrawn cash was later handed over to Liew Ket Boh and Kenny Liew. Jazrul also admitted that he had requested

Wilton to sign cheques for the purpose of withdrawing cash from Grow Asia's account in CIMB Bank. The cash was subsequently handed over to Liew Ket Boh.

[11] Sarjan Zairey Lee also obtained a s 112 CPC statement from Mariana, who had been working for Liew Ket Boh since 2016 with a monthly salary of RM1,200. She corroborated Jazrul's claim that Liew Ket Boh instructed her to register a trading licence under his name and open a bank account as well. She was later instructed by Liew Ket Boh to transfer monies in accordance with a list of business entities and bank accounts. Nine other employees were given the same task. However, she was asked to cease performing that task in November of 2018.

[12] Sarjan Zairey Lee continued his investigation by taking a s 112 CPC statement from Kenny Liew, the second appellant herein. Kenny Liew said that Liew Ket Boh, also known as Ryan, is his cousin. He denied being involved in Grow Asia's business or the investment scheme in question. However, he admitted to the following in his statement. In November of 2018, Liew Ket Boh requested him to collect cash in the sum of RM400,000 from Jazrul and deposit it into an account under his name with CIMB Bank. Kenny Liew carried out the said task for Liew Ket Boh.

[13] In his s 112 CPC statement, Liew Ket Boh denied any involvement in collecting deposits from investors under the Grow Asia scheme. He said that he was only running a construction business. He also denied being in control of the accounts of Grow Asia or Carousel Capital.

[14] The prosecution also relied on the affidavit of ASP Nor Hazwani bt Jasman to support the forfeiture application. She was the officer who conducted the money laundering investigation under the AMLATFPUAA. She accessed and studied all relevant documents including the statements of the bank accounts of Carousell Capital and Grow Asia.

[15] She found that between July of 2018 and December of 2018, monies were frequently deposited into these accounts. She also examined the transactions between these bank accounts and the bank accounts of Centrowest Trading and Sun Construction. The Ambank account of Centrowest Trading was only opened on 12 October 2018. However, soon after that, a total sum of RM8,162,532.82 was transferred from the CIMB account of Carousell Capital and credited to the Ambank account of Centrowest in a series of 45 transactions. Additionally, RM3,256,998 was transferred from the CIMB account of Grow Asia into the same Ambank account in a series of 18 transactions.

[16] ASP Hazwani also meticulously examined the Hong Leong Bank account of Sun Construction in connection to the account of Carousell Capital. The account was only opened on 8 October 2018. However, RM3,456,359 was transferred from the account of Carousell Capital and credited to the account of Sun Construction in a series of 18 transactions. Only RM18,066.32 remained in the account of Carousell Capital. A sum of RM2,701,675 was also transferred from the bank account of Grow Asia and credited to the same account in a series of 11 transactions. Only RM22,210.50 remained in the account of Grow Asia. ASP Hazwani noted that most of the monies in the accounts of Centrowest and Sun Construction were withdrawn through cash transactions.

[17] ASP Hazwani proceeded to investigate the bank accounts of Liew Ket Boh and Kenny Liew. The MBB Account 51014365497 of Liew Ket Boh was opened on 8 July 2015. She noted two transactions involving cash between 25 October 2018 and 1 November 2018. A cash sum of RM40,000 and RM240,000 was deposited into this account during the said period. The customer service officer of the MBB Karamunsing branch in Kota Kinabalu confirmed that Liew Ket Boh personally deposited RM240,000 in cash into the said account on 1 November 2018. The balance at the time of seizure of the account under s 50(1) of the AMLATFPUAA by the public prosecutor was RM134,217.11.

[18] The CIMB Bank Fixed Deposit Account 50044655333 of Liew Ket Boh was opened on 24 October 2018 which was during the period that the victims of the Grow Asia scheme were depositing monies into the bank accounts registered in the name of Wilton and Anirah. RM200,000 was transferred to this fixed deposit account on the same day from the CIMB Current Account 8009653108 of Liew Ket Boh. On 1 November 2018, RM315,000 was transferred to the same fixed deposit account from the CIMB Current Account 2589 of Liew Ket Boh. The remaining balance in the CIMB bank Fixed Deposit Account 50044655333 when it was seized under s 50(1) of the AMLATFPUAA was RM515,000.

[19] ASP Hazwani also investigated CIMB current accounts belonging to Liew Ket Boh from which monies were transferred to his CIMB Bank Fixed Deposit Account 50044655333. He discovered that a cash sum of RM420,000 was deposited over the counter into CIMB Current Account 80081222589 on 1 November 2018. The balance in that current account prior to the said huge cash injection was only RM1,818.58. As stated earlier, on the same day, a sum of RM315,000 was transferred from that current account to Fixed Deposit Account 50044655333 CIMB bank. At the date of the seizure of CIMB Current Account 80081222589, the remaining balance was RM106,804.24.

[20] In respect of CIMB Current Account 8009653108, ASP Hazwani noted that it was opened on 24 October 2018 with an over the counter cash deposit of RM160,000. On the same date, RM91,000 was transferred into this account from CIMB Current Account 8602170656 which also belonged to Liew Ket Boh. A sum of RM200,000 was then transferred from CIMB Current Account 8009653108 to the CIMB Fixed Deposit Account 5333 of Liew Ket Boh. At the date of seizure, the balance in CIMB Current Account 8009653108 was RM51,068.09. The remaining balance in CIMB Current Account 8009653108 that was seized was RM80,311.10.

[21] The explanation that Liew Ket Boh gave in his statement recorded under s 32 of the AMLATFPUAA for above mentioned deposits in his bank accounts and the related cash transactions is that he received the said monies in his capacity as a broker for real estate purchasers from investors. However, he failed to refer to any specific sale and purchase transactions.

[22] ASP Hazwani also investigated the personal bank accounts of Kenny Liew. It must be recalled that in his statement, Kenny Liew had only admitted to collecting a cash sum of RM400,000 from Jazrul and depositing it into Liew Ket Boh's bank account. However, ASP Hazwani found movement of large sums of money between various bank accounts of Kenny Liew during the period the 'investors' of the Grow Asia scheme were duped.

[23] Kenny Liew had opened CIMB Current Account 8009657699 on 25 October 2018. A sum of RM329,147 was transferred to this account from his CIMB Savings Account 7061229385. Thereafter, RM150,000 each were transferred to his CIMB Fixed Deposit Account 5006962359 and CIMB Fixed Deposit Account 5800744150. The balance remaining in the above-mentioned accounts of Kenny Liew at the time of seizure under s 50(1) of the AMLATFPUAA are as follows. In CIMB Fixed Deposit Accounts 5006962359 and 5800744150 there was RM150,000 each. In Current Account 8009657699 there was RM36,264.46 whereas in CIMB Savings Account 7061229385 there was RM57,195.26.

AFFIDAVIT EVIDENCE OF LIEW KET BOH AND KENNY LIEW

[24] In his affidavit to oppose the forfeiture application, Liew Ket Boh denied any involvement in the Grow Asia investment scheme, as stated in his s 32 AMLATFPUAA statement. He said he has no link to Centrowest Trading and Sun Construction and that he is not the registered owner. He said that Jazrul had falsely accused him during police investigation to escape prosecution. He also denied giving instructions to Mariana to transfer funds to various accounts according to a list supplied by him. He said that Sarjan Zairey Lee acted in bad faith by linking him to the Grow Asia Scheme to cheat

investors. He contended that the RM400,000 that was deposited into his bank account was his commission from a successful sale of a property. However, he did not exhibit any supporting documents. He said that monies that were seized also represented his earnings from positions he held in his family companies. He said that the AMLATFPUAA investigation officer, ie ASP Hazwani acted in bad faith during investigations.

[25] Kenny Liew also denied being involved in the Grow Asia investment scheme. He had no interest in Centrowest Trading or Sun Construction. He said that the transactions in his accounts were for the purpose of his business and private matters. He said his family company by the name of All Master Express Sdn Bhd was involved in marketing the 'Amelia' brand ice cream throughout Sabah. All the monies in his accounts that were seized were derived from legitimate business and are not derived from unlawful activity.

DECISION OF HIGH COURT

[26] The evidence collected by the predicate investigating officer ('Sarjan Zairey Lee') in the form of statements recorded under s 112 of the CPC from all the complainants and from Wilton, Jazrul, Mariana, Liew Ket Boh and Kenny Liew was before the learned High Court judge. An objection was taken to the s 112 CPC statements by their counsel on the ground that it is not allowed by s 113 of the Criminal Procedure Code. The High Court case of *Public Prosecutor v CPO Resources & Ors* [2019] MLJU 756; [2019] 1 LNS 846 was cited in support. However, the learned High Court judge noted that the prosecution also adduced a statement given by Sarjan Zairey Lee under s 32 of the AMLATFPUAA. The contents of the s 112 CPC statements of the witnesses that Sarjan Zairey Lee interviewed for the predicate offence were repeated in that statement. In addition, as we stated earlier Sarjan Zairey Lee also affirmed an affidavit in which he repeated the evidence he gathered in the s 112 CPC statements.

[27] Based on the above evidence, the learned High Court judge found as follows. The unsuspecting investors made numerous deposits into the bank accounts of two entities that held trading licences: Grow Asia and Carousell Capital. Grow Asia was registered under the name of Wilton. Subsequently, the monies were transferred to the bank accounts of Centrowest and Sun Construction that also held trading licences registered under the name of Jazrul. The monies of the depositors flowed into these two accounts. Jazrul said that the two accounts were actually controlled by Liew Ket Boh under whose instruction he acted. The learned High Court judge also noted that Kenny Liew admitted collecting a sum of RM400,000 from Jazrul to be deposited into Liew Ket Boh's bank account. The learned High Court judge was satisfied that Sarjan Zairey Lee, the predicate offence investigating officer and ASP Hazwani,

A the AMLATFPUAA investigating officer had carried out a careful investigation. The learned High Court judge made a finding on a balance of probabilities that the monies seized in the accounts of the appellants, Centrowest and Sun Construction are linked to an illegal investment scheme in which investors were cheated.

B

[28] The learned High Court judge also gave careful consideration to the explanations of Liew Ket Boh and Kenny Liew in their affidavits in reply. Liew Ket Boh said that the huge sums of money that were seized in his bank accounts represented his earnings and his real estate dealings. The learned High Court judge rejected the explanation as no details were given to support the said assertion. He rejected a similar explanation from Kenny Liew as well for the same reason.

C

D **[29]** His Lordship directed himself that the prosecution need not prove that the appellants committed the predicate offence under s 420 of the Penal Code but only need to prove on a balance of probabilities that the assets sought to be forfeited are derived from unlawful activity. As there was a link between the monies that were seized in the accounts of Liew Ket Boh and Kenny Liew and

E the investment scheme and their explanation in respect of the source of the monies was not satisfactory, the learned High Court judge found that the prosecution had proved on a balance of probabilities that the said monies are proceeds of unlawful activity. Consequently, application was allowed and all the monies in seized bank accounts were forfeited.

F

ISSUES

[30] Liew Ket Boh and Kenny Liew were represented by the same counsel. He raised the following commons issues on behalf of both:

G

(a) that the public prosecutor failed to identify which transactions are in respect of the proceeds of the predicate offence; and

(b) that the public prosecutor had failed to prove that his clients committed or abetted or participated in the commission of the predicate offence for

H two reasons. The first reason is that the court cannot rely on the s 32 AMLATFPUAA statement of Sarjan Zairey Lee. The second reason is that the High Court allegedly relied on the s 112 CPC statements which are hearsay and inadmissible evidence.

I IDENTIFICATION OF MONIES OR TRANSACTIONS

[31] Counsel for appellants submitted that the respondent failed to prove that the monies seized were derived from unlawful activity, ie the predicate offence of cheating under s 420 of the Penal Code. He cited the following

passage from the judgment of the High Court and criticised it on the ground that it was unclear which transactions in the bank accounts were linked to the predicate offence. The passage is as follows:

> As for statements by ASP Hazwani in her Affidavit which was relied by the applicant to support the application. It was obvious she has checked the details and the transaction of the monies in the account and concluded that the proceeds were from the predicate offence was deposited into various account that are the subject matter of the present application.

[32] Counsel for the appellants then submitted that the respondent failed to demonstrate the money trail between the predicate offence and the bank accounts of the appellants. He also argued that the respondent must point out the 'exact transactions' on the bank statements of the appellants that were derived from the proceeds of the predicate offence.

[33] We shall now address the issue whether there is a duty on the part of the respondent to prove that the 'exact transactions' on the bank statements of the appellants were the 'exact' amounts of monies derived from unlawful activity.

[34] In the instant case, the predicate offence was cheating under s 420 of the Penal Code. The general public were lured into investing in a fraudulent investment scheme with the promise of high returns. While numerous investors participated in the scheme, only 29 of them filed police reports. From the evidence that we summarized earlier, the total sum of deposits made by the investors amounted to millions of ringgit as evidenced by the bank statements Grow Asia and Carousel Capital.

[35] In a forfeiture application under s 56(1) of the AMLATFPUA, the central question is whether, on a balance of probabilities, the prosecution has proven that the balances in the bank accounts of the appellants are the proceeds of unlawful activity. We find that the public prosecutor had tendered cogent evidence to prove this fact. However, in our opinion, it is not necessary to link the monies deposited into the bank accounts of Grow Asia and Carousel Capital by investors to every single transaction in the bank accounts of the appellants. This is what counsel for the appellants suggested that should have been done by the public prosecutor. He argued that the public prosecutor failed to prove that the 'exact transactions' on the bank accounts of the appellant were linked to the unlawful activity.

[36] We find that the authority cited for the said proposition by counsel for the appellants, ie the Court of Appeal case of *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 4 MLRA 226 is distinguishable on the facts. Furthermore, we are of the view that the said authority does not impose an onerous duty on the public prosecutor to prove the direct

relationship of every transaction in a bank account to the unlawful activity in question.

[37] But before we consider the facts of the *Billion Nova* case and its applicability to the instant case, for the sake of context, we shall briefly discuss the forfeiture regime set out in the AMLATFPUAA in cases where no prosecution is instituted by the public prosecutor as is the situation in this case.

FORFEITURE SCHEME UNDER THE AMLATFPUAA

[38] Under s 56(1) of the AMLATFPUAA, if there is no prosecution, the respondent can apply for forfeiture of immovable or movable properties on the ground that it had been obtained as a result of or in connection with an offence under sub-s 4(1) of the AMLATFPUAA. Section 56 read as follows:

> (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no applicant or conviction for an offence under subsection 4(1) or a terrorism financing offence, the public prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (a) that the property is the subject-matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
>
> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
>
> (4) *In determining whether or not the property has been obtained as a result of or in connection with an offence* under subsection 4(1) or a terrorism financing offence or is terrorist property, *the court shall apply the standard of proof required in civil proceedings.* (Emphasis added.)

Section 4(1)(a) of the AMLATFPUAA, in part, reads as follows:

> Any person who:
>
> (a) engages in, or attempts to engage in; or

(b) abets the commission of, money laundering, commits an offence and shall on conviction be liable to a fine not exceeding RM5 million or to imprisonment for a term not exceeding five years or to both.

[39] In s 3(1), 'money laundering' means the act of a person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

'Unlawful activity' is defined in s 3(1) as:

any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence.

As for 'serious offence', in the same definition section, it means:

(a) any of the offences specified in the Second Schedule;

In the Second Schedule, the offence of cheating under s 420 of the Penal Code is included as a serious offence.

[40] We must also point out that under s 56(1) of the AMLATFPUAA, it is plain that there is no requirement on the part of the respondent to obtain a conviction against the owner of the property or anyone else for a money laundering offence or terrorism offence in order to apply for forfeiture. A s 56(1) proceeding is against property and not any individual. It is for this reason that s 61 of the AMLATFPUAA contains a provision for bona fide third parties to come forward to stake their claim to the seized property. In the instant case, no third parties came forward. The appellants herein are owners of the seized bank accounts.

[41] The burden to prove that the monies in the bank accounts of the appellants were derived from unlawful activity is on the public prosecutor as the applicant. However, the standard of proof is the civil standard, ie on a balance of probabilities as stated in s 56(4). Furthermore, s 70 says that any question of fact in proceedings under the AMLATFPUAA, apart from proceedings to prove an offence, shall be decided on a balance of probabilities.

THE BILLION NOVA CASE

[42] We shall turn to the *Billion Nova* case that was heavily relied upon by counsel for the appellants to argue that the monies in the accounts were not exactly identified as the monies that were derived from the unlawful activity in question, ie the offence of cheating committed through the fraudulent Grow Asia investment scheme.

[43] The facts of the *Billion Nova* case are significantly different. There was no individual victim of the predicate offence in that case. Thus, no victim gave

a s 112 CPC statement. It was the public purse that was the alleged victim as the predicate offence that was investigated was customs duty evasion under s 135(1)(g) of the Customs Act 1967. It is an offence listed in the Second Schedule of the AMLATFPUAA.

[44] Billion Nova Sdn Bhd was based in the Federal Territory of Labuan which is a duty-free zone. It was allowed to sell duty-free cigarettes and liquor only in Labuan. The accusation against Billion Nova Sdn Bhd was that it sold dutiable items outside of Labuan, namely Miri and Kota Kinabalu without payment of export duty. However, the investigation was not based on evidence of smuggled goods on which customs duty was not paid. Goods on which duty were not paid were not seized from Billion Nova Sdn Bhd while in transit out of Labuan. The investigation was based on purely on documentary evidence. The evidence uncovered during the investigation was that 82 cash deposits were made into 24 bank accounts of Billion Nova Sdn Bhd in Labuan from Miri and Kota Kinabalu. The investigating officer could not find a corresponding book keeping entry evidencing sale of goods in relation to the 82 cash deposits in the standard ledger book of Billion Nova. The Court of Appeal held that even if the 82 deposits were stated as cash sales for cigarettes in the standard ledger, it would be insufficient to conclude that an offence under s 135(1)(g) of the Customs Act 1967 had been committed without evidence of a sale transaction in both locations, in Miri and Kota Kinabalu. The Court of Appeal also observed that there was no evidence of transportation of the cigarettes to Miri and Kota Kinabalu and that nothing in the law prohibits payment to be made for goods purchased in Labuan from Miri or Kota Kinabalu. Thus, the case for the existence of the predicate offence wholly hinged on the evidence that payments were made from outside a duty-free zone to a supplier who is based within a duty-free zone. Both the High Court and Court of Appeal found that this was not sufficient.

[45] However, counsel for the appellants in the instant case cited the above mentioned case to argue that the AMLATFPUAA investigating officer never pointed out the 'exact transactions on the bank statements of the first appellant's accounts allegedly derived from the proceeds of the predicate offence'. In support, he cited para [30] of the judgment in the *Billion Nova* case which reads as follows:

> *Thus, save for their mere averment* in the affidavits on the 82 cash deposits amounting to RM2,675,090, the appellant failed to prove that the remaining cash deposits were actually in respect of the cash sales of duty free cigarettes. The entries in the Labuan account merely indicate payments from Miri and Kota Kinabalu. *Standing on its own,* these entries in the Labuan account, without proof of corresponding entries in the standard ledger book, do not show that the cash deposits were indeed in respect of the cash sales for cigarettes. We are in no position to identify which entries in these documentary exhibits are in respect of the 82 cash deposits stated in the second affidavit save for the 16 cash deposits earlier-mentioned. It would not be

> sufficient for the appellant to persuade the court to accept these sums with the argument urged on its behalf that we should draw a conclusion that these were cash deposits in respect of cash sales of duty free cigarettes outside Labuan when there was a serious and glaring omission on their part to show the court these relevant entries. In any event, even assuming that all the 82 cash deposits were stated as cash sales for cigarettes in the standard ledger book, this is still insufficient to prove that the cigarettes were sold in Miri and Kota Kinabalu in the absence of any evidence of such sale transactions in both locations. If there is no such evidence, then surely the appellant could not expect the court to hazard a guess that these sums were in fact the proceeds of the respondents' unlawful activity for this in our view would tantamount to sheer speculation. (Emphasis added.)

[46] In our view, the above mentioned passage does not support the argument canvassed by counsel for the appellants. As we said earlier, in the *Billion Nova* case, the entire case for the existence of the predicate offence was based on the 82 cash deposits made from outside of Labuan into the accounts of the company. There was no other evidence of the predicate offence. This is the reason that the Court of Appeal said that 'mere averment in the affidavits on the 82 cash deposits' is not enough. For the same reason, the Court of Appeal also said that 'standing on its own', the entries in the bank accounts without proof of corresponding entries in the standard ledger book cannot show that the deposits were in respect of cash sales of cigarettes. Thus, no evidence of the predicate offence was presented.

[47] However, in the instant case, there is evidence that a cheating offence had been committed. This is the predicate offence. 29 victims lodged police reports and gave s 112 CPC statements saying that they had been cheated in the Grow Asia investment scheme and that they had lost their investment. Whether they had been cheated or not is question of fact. Under s 70 of the AMLATFPUAA, such a question of fact can be decided on a balance of probabilities. The High Court decided that they had been cheated. It is immaterial that the appellants or other individuals were not convicted of the offence of cheating as that is not a pre-condition under s 56(1) of the AMLATFPUAA.

[48] Similarly, as we said earlier, there is no requirement to obtain a conviction for a money laundering offence under s 4(1) of the AMLATFPUAA against any individual before instituting forfeiture proceedings. Under the broad definition of money laundering, any engagement directly or indirectly with proceeds of unlawful activity would be sufficient. And for the purpose of forfeiture proceedings, the standard of proof is the civil standard namely, balance of probabilities. Thus, the flow of the victims' monies into any bank account is sufficient to prove the existence of the offence of money laundering on a balance of probabilities even though no individual was charged or

convicted. This fact was clearly proven by the public prosecutor as found by the High Court.

[49] We are of the view that the argument of counsel for the appellants that all the 'exact transactions' on the bank accounts must be linked to the unlawful activity is not envisaged in the AMLATFPUAA.

[50] 'Proceeds of unlawful activity' is defined in s 3(1) as any property, any economic advantage or economic gain from such property, within or outside Malaysia:

> (a) which is wholly or partly —
>
> (i) derived or obtained, directly or indirectly, by any person from any unlawful activity;
>
> (ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or
>
> (iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or
>
> (b) which, wholly or partly, *due to any circumstances such as its nature, value, location or place of discovery*, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or *its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a)(i), (ii) or (iii)*. (Emphasis added.)

[51] A careful reading of para (b) would support the proposition that any property found together with property derived from unlawful property as defined in para (a) can also be 'reasonably' considered as proceeds of unlawful property if certain conditions are present.

[52] In the instant case, the public prosecutor has successfully established the offence of cheating based on the statements of the victims involved in the Grow Asia's investment scheme. The appellants have also been implicated on the scheme for the following reason. The monies of the victim were deposited into accounts under the names of Wilton and Anirah, with Jazrul instructing the opening of these accounts. He retained the ATM cards for these accounts, withdrew cash using cheques and subsequently handed over the withdrawn cash to Liew Ket Boh and Kenny Liew. Jazrul was employed by Liew Ket Boh who also gave instructions to Mariana and other employees in his company about the transfer of monies. For this purpose, a list of business entities and bank accounts was given to his employees. Thus, the large sums of monies in the seized accounts of Liew Ket Boh and Kenny Liew are clearly, as found by the High Court on a balance of probabilities, linked to the predicate offence.

[53] Since the seized properties in question are liquid assets, it becomes a formidable challenge for enforcement authorities to prove the direct correlation of every single cash deposit or transaction in a seized bank account with the unlawful activity. However, in our view, the broad definition of 'proceeds of unlawful activity' should come to the aid of the public prosecutor. Drawing an analogy, if the property in question is an immovable asset purchased using partly proceeds of unlawful activity and partly other legitimate funds, the entire property would be caught by the said broad definition. Any other interpretation would jeopardize the objective of the AMLATFPUAA, which is aimed at depriving serious crime offenders of their ill-gotten gains.

[54] For the above reasons, we find no merit in the first issue raised on behalf of both appellants.

ADMISSIBILITY OF S 112 CPC STATEMENTS

[55] The second issue argued by counsel for the appellant is that all the s 112 CPC statements, in particular the statement of Wilton and Jazrul, that was recorded by the predicate offence investigating officer cannot used in a s 56(1) application. This argument was accepted by the learned High Court judge. However, His Lordship relied on the statement of the predicate offence investigating officer that was recorded under s 32 of the AMLATFPUAA. Counsel for the appellant submitted the s 32 AMLATFPUAA statement is based on information derived from the s 112 CPC statements of Wilton and Jazrul. Therefore, according to counsel, the s 32 statement of the predicate offence investigating officer that was recorded by the AMLATFPUAA investigating officer cannot be relied upon. It follows that there is no evidence of the involvement of the appellants in the Grow Asia scheme.

[56] We shall first consider the argument that s 112 CPC statements cannot be used in a proceeding under s 56(1) of the AMLATFPUAA. The argument is based on s 113 of the CPC. Section 113 reads as follows:

> (1) Except as provided in this section, *no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence*.
>
> (2) *When any witness is called for the prosecution or for the defence, other than the accused*, the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks fit in the interest of justice, direct the accused to be furnished with a copy of it and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act 1950 [Act 56].
>
> (3) Where the accused had made a statement during the course of a police

investigation, *such statement may be admitted in evidence in support of his defence during the course of the trial*.

(4) Nothing in this section shall be deemed to apply to any statement made in the course of an *identification parade* or falling within section 27 or paragraphs 32(1)*(a)*, *(i)* and *(j)* of the Evidence Act 1950.

(5) When any person *is charged with any offence* in relation to —

(a) the making; or

(b) the contents,

of any statement made by him to a police officer in the course of a police investigation made under this Chapter, *that statement may be used as evidence in the prosecution's case*. (Emphasis added.)

[57] On the other hand, the learned deputy prosecutor argued that the s 112 CPC statements are admissible under s 71 of the AMLATFPUAA. Section 71 reads as follows:

> Where the public prosecutor or any enforcement agency has obtained any document or other evidence in exercise of his powers under this Act or by virtue of this Act, such document or copy of the document or other evidence, as the case may be, shall be admissible in evidence in any proceedings under this Act, *notwithstanding anything to the contrary in any written law*. (Emphasis added.)

[58] The same issue arose in the High Court case of *Public Prosecutor v CPO Resources & Ors* [2019] MLJU 756; [2019] 1 LNS 846. In that case, the learned High Court judge disallowed the s 112 CPC statements. His Lordship's reasons are found in the following passages of the judgment:

> [57] It is clear from a reading of s 113 that a statement taken under s 112 can be used to impeach the credibility of a witness other than an accused person. However, an accused himself may utilize his statement in support of his defence.
>
> [58] The intent of s 113 is thus obvious. To hold otherwise as contended by the Applicant would be to render admissible through the back door what has been prohibited through the front door.
>
> [59] Further, if the statement made the accused under s 112 of the CPC is allowed to be used under the AMLA, it would be manifestly unfair if such statement was made under threat, inducement or promise and thus involuntary as there does not exist any mechanism for determining the voluntariness or otherwise of the statement in the AMLA proceedings.
>
> [60] I therefore find that the phrase 'evidence' in s 68(2) of AMLA does not include a statement taken under s 112 of the CPC. I also find that the phrase 'under this Act or by virtue of this Act' in s 71 of AMLA is confined to that Act alone ie AMLA and does not extend to cover the provisions of the CPC.
>
> [61] The applicant therefore cannot rely upon the statements of the respondents taken pursuant to s 112 of the CPC in order to prove the case.

[59] The learned High Court judge in the instant case followed the above mentioned authority and did not consider the s 112 CPC statements. However, his Lordship considered the s 32 AMLATFPUAA statement and the affidavit of the predicate offence investigating officer in which he repeated the contents of the s 112 CPC statements that he recorded.

[60] In our respectful view, the s 112 CPC statements of Jazrul, Wilton and Mariana can be used in a s 56 proceedings for the following reasons. The references in s 113 are all associated with a criminal trial such as 'accused', 'witness', 'impeachment proceedings' and 'identification parade'. Thus, a holistic reading of all the limbs of s 113 of the CPC points to the conclusion that a s 112 CPC statement is barred from being used by the prosecution in a criminal trial only. It bears repeating that a s 56(1) proceeding under the AMLATFPUAA is not a trial against any accused person. It is a quasi-criminal proceeding against proceeds derived from unlawful activity only.

[61] Furthermore, s 71 of the AMLATFPUAA is drafted widely and contains the words 'notwithstanding anything to the contrary in any written law'. It allows any 'document' or 'evidence' obtained by the public prosecutor or enforcement agency to be used in a s 56(1) proceeding. In the instant case, the AMLATFPUAA investigating officer using her powers under the said Act, accessed all the relevant documents and evidence including that obtained by the predicate offence investigating officer as stated in her affidavit. The information collected by the predicate investigating officer through the s 112 CPC statements of Jazrul and Wilton were repeated in his s 32 AMLATFPUAA statement. In the premises, in our view, the information contained in the s 112 CPC statements recorded by the predicate offence investigating officer clearly fall within the ambit of s 71 of the AMLATFPUAA.

[62] In addition, given that the AMLATFPUAA is a special law governing matters connected with the offence of money laundering and forfeiture proceedings, the general provision of s 113 of the CPC should yield to s 71 of the former. In any event, s 71 is only concerned with admissibility of documents and evidence. As to the weight to be attached to such documents and evidence, it entirely up to the first instance court to consider the credibility and reliability of them. Therefore, we find no error on the part of the learned High Court judge when His Lordship considered the s 32 AMLATFPUAA statement and affidavit of the predicate offence investigating officer that repeated the contents of the impugned s 112 CPC statements.

[63] We are also fortified in reaching this conclusion by the decision in the Federal Court case of *Public Prosecutor v Awalluddin bin Sham Bokhari* [2018] 2 MLJ 401; [2018] 1 CLJ 305. The Federal Court considered s 40 of the AMLATFPUAA which reads as follows:

> 40 Statement to be admissible
>
> The record of an examination under paragraph 32(2)(a), any property, document or information produced under paragraph 32(2)(b) or any statement under paragraph 32(2)(c) shall, notwithstanding any written law or rule of law to the contrary, be admissible as evidence in any proceedings in any court for, or in relation to, an offence or any other matter under this Act or any offence under any other written law, regardless whether such proceedings are against the person who was examined, or who produced the property, document or information, or who made the written statement on oath or affirmation, or against any other person.

[64] The Federal Court held that any statement of police officers under s 32(2) is not hearsay by virtue of s 40 as it was acquired in the course of investigation. The relevant passage is as follows:

> [33] Any property, record, report or document obtained by the investigation officer pursuant to s 32(2) of the Act are, by virtue of s 40 of the Act, admissible as evidence in any proceedings in any court for or in relation to an offence or any other matter under the Act or any offence under any other written law. The Court of Appeal was clearly in error in holding that para 32 of the investigation officer's affidavit was 'purely hearsay'. It also erred in ruling that the learned trial judge committed an error in relying 'on an affidavit which is not worth the paper it is written on'. What had been deposed by these two senior police officers in their affidavits, which were based on their personal knowledge acquired in the course of investigation under s 32 of the Act, could not be said as purely hearsay.

[65] For the same reasons, we are of the view that the information contained in the statement of the predicate offence investigating officer (Sarjan Zairey Lee) recorded under s 32(2) of the AMLATFPUAA by ASP Nor Hazwani that was considered by the High Court is not hearsay as argued by the counsel for the appellants.

CONCLUSION

[66] For all the above reasons, we find no merit in the two issues raised by counsel for the appellants. We also find that the learned High Court judge finding that the balances in the seized bank accounts of the two appellants are proceeds of unlawful activity does not warrant appellate interference for reasons that we adverted to earlier. We shall therefore dismiss the appeals of both the first and second appellants.

Appeals dismissed.

Reported by Dzulqarnain Ab Fatar